No. 23-1803

In the United States Court of Appeals
For the Sixth Circuit

ASSOCIATED BUILDERS & CONTRACTORS, INC. OF MICHIGAN,

Plaintiff-Appellant,

v.

JENNIFER A. ABRUZZO, IN HER OFFICIAL CAPACITY AS GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Michigan
No. 1:23-cv-00277 - Hon. Robert J. Jonker

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DEFENDANT-APPELLEE'S POSITION REGARDING ORAL ARGUMENT

Defendant-Appellee Jennifer Abruzzo, in her official capacity as General Counsel for the National Labor Relations Board ("NLRB"), does not believe that oral argument is necessary in this matter, as it involves the well-settled application of Supreme Court precedent regarding subject-matter jurisdiction under the National Labor Relations Act ("NLRA") and standing, both of which preclude Plaintiff-Appellant's claims.

DEFENDANT-APPELLEE'S RESPONSE TO JURISDICTIONAL STATEMENT

This case is before the Court on the appeal of Plaintiff-Appellant Associated Builders & Contractors of Michigan, Inc. ("Appellant" or "ABC") of an Opinion and Order of the United States District Court for the Western District of Michigan, issued on July 31, 2023. The court's opinion dismissed ABC's lawsuit for lack of subject-matter jurisdiction and standing. Opinion R. 23, Page ID ## 375 – 389. ABC filed a timely notice of appeal on September 5, 2023. This Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291, and should affirm the district court's dismissal.

As the lower court properly held, jurisdiction over the underlying claims at issue is precluded by the comprehensive review scheme provided for in the NLRA, *NLRB v. UFCW, Loc. 23*, 484 U.S. 112, 128 (1987); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), and by ABC's failure to demonstrate standing under Article III of the Constitution.

COUNTERSTATEMENT OF ISSUES ON REVIEW

1. Does the National Labor Relations Act preclude district court jurisdiction to review a non-binding interim guidance memorandum issued by the General Counsel of the National Labor Relations Board that explains a prosecutorial position she will present to the Board in future cases alleging NLRA violations?

2. Does ABC have Article III standing where its claims rely upon a remote chain of contingencies that are largely under the control of third parties, not the NLRB, and where the remedy it seeks does not restrain the NLRB from other activity with the same impact?

3. If this Court finds subject-matter jurisdiction and standing satisfied, should it proceed to address the novel constitutional issue

raised by Appellants without the benefit of a lower court decision and full briefing on the merits of ABC's claims?

STATUTORY ADDENDUM

Pertinent statutes and rules are included in the Addendum to this brief.

COUNTERSTATEMENT OF THE CASE

I. Structure of the NLRB

Congress created the NLRB in 1935 to enforce and administer the NLRA. The centerpiece of the NLRA is Section 7, which establishes the rights of employees "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as "the right to refrain from any or all of such activities." 29 U.S.C. § 157. The NLRB protects Section 7 rights by investigating, prosecuting, and remedying certain statutorily described unfair labor practices committed by employers and labor organizations. 29 U.S.C. § 158.

The NLRA draws a clear dividing line between the powers of the General Counsel, which are investigative and prosecutorial, and those

of the five-member Board, which are adjudicative. Thus, Section 3(d) of the NLRA establishes the independent office of the NLRB General Counsel, and gives the General Counsel "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of [administrative] complaints . . . , and in respect of the prosecution of such complaints before the Board." 29 U.S.C. § 153(d). Section 3(a), in turn, establishes the five-member Board, which issues decisions and final orders adjudicating the merits of the General Counsel's complaints, typically on review of an administrative law judge's recommended disposition. *Id.* § 153(a).

The procedures governing unfair-labor-practice proceedings are laid out in Section 10 of the Act. *Id.* § 160. These procedures provide for two avenues of court review of final Board action: either upon a petition by the Board for enforcement of its final order, *id.* § 160(e), or upon a petition for review by "[a]ny person aggrieved by a final order of the Board," *id.* § 160(f). In either case, such review takes place in an appropriate circuit court of appeals. *Id.* § 160(e), (f).

II. The General Counsel's Memorandum Concerning Captive Audience Meetings

Since the 1970s, NLRB General Counsels have issued publicly available guidance memorandums to establish various policy initiatives.[1] Some, but not all, of these memoranda have included guidance regarding the General Counsel's legal interpretations of the NLRA and have announced efforts to convince the Board, through the issuance and litigation of unfair-labor-practice complaints, to change existing precedent.

This appeal concerns General Counsel Memorandum 22-04, issued by General Counsel Jennifer Abruzzo on April 7, 2022, entitled "The Right to Refrain from Captive Audience and other Mandatory Meetings" (Memorandum). Complaint Exh. 1, R. 1-1, Page ID # 31. The General Counsel directed the Memorandum to the Agency's heads of field offices throughout the country, which operate under her supervision. *Id.* The Memorandum opens by explaining that "[i]n workplaces across

[1] All NLRB General Counsel memoranda can be accessed here: General Counsel Memos | National Labor Relations Board, https://www.nlrb.gov/guidance/memos-research/general-counsel-memos (last visited Oct. 16, 2024).

America, employers routinely hold mandatory meetings in which employees are forced to listen to employer speech concerning the exercise of their statutory labor rights, especially during organizing campaigns." *Id*. The Memorandum then states the General Counsel's theory that "those meetings [routinely referred to as "captive audience meetings"] inherently involve an unlawful threat that employees will be disciplined or suffer other reprisals if they exercise their protected right not to listen to such speech." *Id*. Thereafter, the General Counsel lays out a "plan to urge the Board to reconsider" the lawfulness of such captive-audience meetings and elaborates her legal theory for why such meetings are coercive. *Id*. The Memorandum concludes by stating the General Counsel's intent to "ask the Board to reconsider current precedent on mandatory meetings in appropriate cases." *Id*. at Page ID # 33

Although the General Counsel has issued several complaints pressing this argument in NLRB administrative proceedings, the Board has not yet issued a final decision regarding her proposed legal theory. *E.g., Starbucks Corp*., 373 NLRB No. 33, slip op. at 1, n.1 (2024);

Starbucks Corp., 372 NLRB No. 159 (2023), slip op. at 1, n.1 (2023); *Cemex Const. Mat. Pac., LLC*, 372 NLRB No. 130, slip op. at 3, n.15 (2023) (decisions where the Board declined to pass on General Counsel's theory regarding captive-audience meetings.

III. The Instant Case

Plaintiff-Appellant ABC is a "statewide trade association representing the commercial and industrial construction industries." Br. 3. On March 16, 2023—nearly a year after the Memorandum issued—ABC filed a Complaint in the Western District of Michigan against the General Counsel. The Complaint contained four counts, alleging that the Memorandum violated the First Amendment because it causes "employers to forgo their free-speech rights due to the threat of being dragged through a prosecutorial process." Complaint, R. 1, Page ID # 5. The Complaint further sought an injunction to "stop[] her from threatening to prosecute employers in her Memorandum," and ordering her to remove the Memorandum from the Agency's public website, as well as a declaration that General Counsel Abruzzo threatened to prosecute employers. Complaint, R. 1, Page ID # 28. To establish subject-matter jurisdiction, the Complaint relied on general federal-

question jurisdiction, 28 U.S.C. § 1331, and alleged that the remedies sought "are authorized by 28 U.S.C. § 2201 and 2202; Rules 57 and 65 of the Federal Rules of Civil Procedure; and the general legal and equitable powers of this Court." Complaint, R. 1, Page ID # 7. ABC filed a Motion for Preliminary Injunction the next day. Motion for Preliminary Injunction, R. 5, Page ID ## 56-61.

On May 22, 2023, the NLRB filed a Motion to Dismiss, arguing both lack of subject-matter jurisdiction because ABC's Complaint was precluded by the exclusive statutory review scheme contained in the NLRA, and lack of standing due to the contingent nature of any alleged harms. Motion to Dismiss, R. 16, Page ID ## 136-189. That same day, the NLRB filed an Opposition to ABC's pending Motion for Preliminary Injunction. Opposition to Motion for Preliminary Injunction, R. 17, Page ID ## 190-211.

After full briefing and argument, on July 31, 2023, the district court issued its opinion and order. Opinion, R. 23, Page ID ## 375-389. The court agreed with the NLRB that ABC's claims failed for lack of subject-matter jurisdiction and standing. *Id.*, at Page ID ## 385, 389. As a result, the district court did not reach the merits of ABC's claims, and

it dismissed as moot ABC's Motion for Preliminary Injunction. *Id.*, at Page ID # 389.

As to subject-matter jurisdiction, the court held that "the NLRA makes no provision for review of the General Counsel's threshold determination concerning whether an unfair labor practice proceeding should be initiated, and the courts have uniformly held that such review is not available." Opinion, R. 23, Page ID # 382. The court further found that the stringent requirements for non-statutory review under the NLRA, as established by the Supreme Court in *Leedom v. Kyne*, were not met, as the General Counsel issued the Memorandum pursuant to her statutory authority under Section 3(d) of the NLRA, and ABC would not be wholly deprived of its rights if required to go through the prescribed administrative process. *Id.* at Page ID ## 383-385.

As an alternative basis for dismissing ABC's Complaint, the lower court found that ABC had failed to establish Article III standing for its claims. The court homed in on ABC's failure to plead "facts sufficient to establish that [its] members have suffered, or been threatened with, a concrete and particularized injury from the General Counsel's conduct." Opinion, R. 23, Page ID # 387. The court specifically found that there

was no evidence to demonstrate that any harm was "certainly impending," as no members faced any legal charges or any current union-organizing campaigns and the Memorandum itself carried no legal force. Opinion, R. 23, Page ID # 388. The court further held that ABC had "fail[ed] to demonstrate redressability [or show how] the requested relief will address the injury." Opinion, R. 23, Page ID # 389. ABC had provided no explanation of how removing the Memorandum from the NLRB's website would be any less threatening than "a brief in an existing case that takes the same position as the memorandum and urges the Board to overturn its precedent." Opinion, R. 23, Page ID # 389. Accordingly, the court dismissed ABC's Complaint. [2]

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[2] On August 31, 2023, the United States District Court for the Eastern District of Texas issued an opinion and judgment in a case raising similar issues, *Burnett Specialists v. Abruzzo*, No. 22-cv-00605, 2023 WL 5660138 (E.D. Tex. Aug. 31, 2023). That case also involves a First Amendment challenge to the same Memorandum at issue here. And the district court there similarly dismissed the plaintiffs' claims for lack of subject-matter jurisdiction and standing. That matter has been appealed, fully briefed, and recently argued before the Fifth Circuit. No. 23-40629 (argued Oct. 8, 2024).

STANDARD OF REVIEW

This Court reviews a district court's decision to dismiss a complaint for lack of subject-matter jurisdiction and standing *de novo*. *Joelson v. United States,* 86 F.3d 1413, 1416 (6th Cir. 1996) (subject-matter jurisdiction); *Miller v. Cincinnati,* 622 F.3d 524, 531 (6th Cir. 2010) (standing). ABC, as the plaintiff-appellant seeking to obtain federal court jurisdiction, bears the burden of establishing both subject-matter jurisdiction and standing. *Cob Clearinghouse Corp. v. Aetna U.S. Healthcare,* 362 F.3d 877, 881 (6th Cir. 2004); *Kardules v. City of Columbus,* 95 F.3d 1335, 1346 (6th Cir. 1996).

When reviewing a motion to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), this court must accept all factual assertions in the complaint as true. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). The same, however, does not apply to legal conclusions. *Id.* And, as the Supreme Court cautioned in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Id.* at 555 (quoting *Papasan v. Allain,* 478 U.S. 265, 286 (1986)).

SUMMARY OF ARGUMENT

Shortly after the passage of the NLRA, the Supreme Court in *Myers v. Bethlehem,* 303 U.S. 41 (1938), established that district courts generally lack jurisdiction to enjoin the processing of unfair-labor-practice cases before the National Labor Relations Board. The Supreme Court, in *Leedom v. Kyne*, 358 U.S. 184 (1958), established an exceedingly narrow exception to *Myers*, requiring that a party seeking interim review of an unfair labor practice proceeding must establish 1) that the agency official is acting expressly outside a specific statutory mandate, and 2) that no other avenue of review be available. As the lower court found, neither of these elements are satisfied here, and thus jurisdiction is lacking.

Rather than confronting this stringent test, ABC repeatedly claims that it need only show some undefined probability that an agency official is violating the Constitution, relying on *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682 (1949). However, as the district court appropriately noted, "the Court ultimately sees *Kyne* as applying *Larson's* general framework to NLRA proceedings and Board action." Opinion, R.23, Page ID # 383, n.2. ABC has failed to cite

to *any* case where *Larson* has been applied to bypass the NLRA's comprehensive review scheme, nor has it explained why the NLRA-specific limitations in *Kyne* should be disregarded. General Counsel Memoranda have never been reviewable in district court, and ABC fails to offer a legal basis to do so here.

ABC gets it equally wrong on standing. It fails to establish how, in the absence of any charges or activity directed towards its members, ABC faces any imminent threat of harm. And even if ABC could establish harm, it fails to demonstrate redressability. As the district court astutely noted, ABC has never established—in the lower court or in its briefing here—how removing the General Counsel's Memorandum from the NLRB's website would remedy the perceived threat of future prosecution. ABC's remedy is particularly meaningless given that it admits (as it must) that the General Counsel can continue to issue public complaints and briefs arguing that captive audience meetings violate the NLRA.

In the event that this Court disagrees with the lower court on both subject-matter jurisdiction and standing, it should not take up ABC's invitation to proceed to the merits of the dispute, as that issue was not

addressed by the lower court and does not have the benefit of full briefing here. Rather, the case should be remanded to the lower court with instructions to consider the merits of ABC's claims.

ARGUMENT

I. The District Court Properly Interpreted ABC's Complaint, as it Accepted All Bona Fide Factual Allegations as True, Not ABC's Legal Conclusions Masquerading as Factual Allegations

Before discussing the legal issues at stake in this case, it is important to clear up ABC's repeated assertions in its brief that the lower court failed to construe allegations in its complaint in favor of ABC. Br. 21, 24, 27-29, 31-32, 35, 46, 48. It is of course true that "[i]n reviewing a motion to dismiss, [the court] must accept non-conclusory allegations of fact in the complaint as true and determine if the plaintiff has stated a plausible claim for relief." *Orton v. Johnny's Lunch Franchise, LLC*¸668 F.3d 843, 846 (6th Cir. 2012). But the court "need not accept as true legal conclusions or unwarranted factual inferences." *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). In other words, "[c]onclusory allegations or legal conclusions masquerading as factual allegations will not suffice." *Eidson v. Tenn.*

Dep't of Child.'s Servs., 510 F.3d 631, 634 (6th Cir. 2007) (quoting *Mezibov v. Allen* 411 F.3d 712, 716 (6th Cir. 2005)).

ABC's briefing elides the distinction between a factual allegation and a legal conclusion. For example, ABC claims that it "cleared th[e] low hurdle [of a motion to dismiss] because it alleged in the Complaint an arguable basis in law in support of its claims: that Abruzzo's Memorandum violated the U.S. Constitution's Free Speech Clause and extended beyond her statutory authority as General Counsel." Br. 24. Whether the Memorandum violates the Constitution, however, and whether it extends beyond her statutory authority, are both legal conclusions—not factual assertions. Similarly, ABC repeatedly claims that because it alleged the Memorandum constituted a "threat" designed to "chill employers' speech," this was sufficient to survive the NLRB's Motion to Dismiss. Br. 32, 35, 46, 48. Not so—again, these are legal conclusions, not factual allegations.

One of the primary authorities relied on by ABC, *National Rifle Ass'n v. Vuollo,* 602 U.S. 175 (2024), demonstrates precisely how this distinction between facts and legal conclusions applies in chill cases. In assessing plaintiff's chill claims, the Supreme Court began by

"[a]ccepting the well-pleaded factual allegations in the complaint as true." *Id.* at 191. The Court accepted as true the challenger's bona fide factual assertions as to the scope of the governmental official's communications with regulated entities, as well as the state official's general power to regulate private parties. *Id.* at 192. The Court then *applied* those factual assertions to reach the legal conclusion that the official's communications could "reasonably be understood as a threat or an inducement." *Id.* at 193.

Here, the assertions accepted as true in ABC's Complaint similarly should be limited to factual assertions, namely the publication of the Memorandum, ABC's (or its members') reaction to the Memorandum, and the General Counsel's broad statutory authority to prosecute employers under the NLRA. The lower court correctly accepted these factual allegations as true. Opinion, R. 23, Page ID ## 387-88. But whether the Memorandum objectively "chilled" speech, fell outside the General Counsel's prosecutorial authority, or otherwise violated the Constitution, are legal conclusions. As explained below, the lower court appropriately applied applicable precedent to these facts in dismissing ABC's Complaint for lack of subject-matter jurisdiction and

standing under Federal Rule of Civil Procedure 12(b)(1). Opinion, R. 23, Page ID ## 388.

II. The District Court Correctly Determined that Jurisdiction Here is Precluded by the NLRA and that Appellants Do Not Otherwise Possess an Equitable Cause of Action.

A. The NLRA's exclusive review scheme precludes district court jurisdiction

It is a "fundamental precept" that federal courts have limited jurisdiction, and these limitations, "whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). Courts are therefore obligated to confirm whether they have subject-matter jurisdiction over a given claim. *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 514 (2006). Here, the exclusive statutory review scheme of the NLRA, combined with the fact that ABC is challenging the unreviewable prosecutorial actions of the NLRB's General Counsel, defeat any claims of subject-matter jurisdiction.

The NLRA provides several distinct avenues for challenging the Agency's actions in federal court, none of which apply here. First, the NLRA establishes jurisdiction in the court of appeals, but only after the Board issues a final decision. Thus, under Section 10(e), the Board may

apply for enforcement of its final orders, and under Section 10(f), an aggrieved party may request review of final Board orders. *See* 29 U.S.C. §§ 160(e)-(f). Second, the NLRA provides district court jurisdiction, but only in two situations, and both at the Board's behest: (1) the issuance of temporary injunctions requested where remedial failure could result from delays in the Board's administrative processes, *see id.* § 160(j), (l); and (2) the resolution of disputed subpoena matters arising from NLRB "hearings and investigations," *see id.* § 161(2). Though the Act identifies these exclusive avenues for federal court jurisdiction over the Agency's actions, ABC does not argue that any of these provisions are relevant to their claims.

The combined effect of these provisions evince a clear congressional intent as to three key points: first, Congress sought to have appellate courts, not district courts, review the vast majority of Board proceedings; second, such review should occur *only* after the issuance of a final Board order; and third, when Congress intended for district court involvement under the NLRA, it explicitly and knowingly created such limited jurisdiction.

Given this review structure, it is unsurprising that shortly after the NLRA's passage, the Supreme Court held that federal district courts lack authority to enjoin the prosecution or adjudication of complaints in unfair-labor-practice hearings. In *Myers v. Bethlehem Shipbuilding Corp.*, an employer attempted to enjoin the prosecution of an unfair-labor-practice case based on alleged constitutional and statutory issues arising from that proceeding. 303 U.S. 41, 46 (1938). The Supreme Court found district court jurisdiction lacking, unequivocally stating:

> The District Court is without jurisdiction to enjoin hearings because the power "to prevent any person from engaging in any unfair practice affecting commerce" has been vested by Congress in the Board and the Circuit Court of Appeals . . . . The grant of that *exclusive* power is constitutional, because the act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board.

Id. at 48 (emphasis added). Its holding, the Supreme Court explained, rested on Congress's reasoned judgment and principles of administrative finality. *Id.* at 50; *see also Shawnee Coal Co. v. Andrus*, 661 F.2d 1083, 1092 (6th Cir. 1981) (noting that *Myers* rationale of exhaustion "allow[s] an administrative agency to perform functions

within its special competence, to make a factual record, to apply its expertise and to correct its own errors so at to moot judicial controversies").

The Sixth Circuit has fully embraced *Myers*'s limitation on district court review of NLRB proceedings. Shortly after *Myers*, the Sixth Circuit held in *Thompson Products v. NLRB*, 133 F.2d 637 (6th Cir. 1943), that there is "no precedent for interference by this court in Labor Board proceedings which have not yet ripened into an order and reached our court by petition for enforcement or review." *Id.* at 640. Since *Thompson Products*, this Court has repeatedly and often summarily rejected attempts to enjoin the Board's administrative processes. *McClain Indus., Inc. v. NLRB,* 521 F.2d 596, 596-97 (6th Cir. 1974) (summarily reversing district court order enjoining NLRB proceeding); *Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 401 (6th Cir. 2002) (dismissing claim to enjoin Board proceedings due to failure to exhaust administrative processes).

In response, ABC claims that these careful jurisdictional guardrails are overcome by general federal-question jurisdiction under 28 U.S.C. § 1331 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-

02. Br. 1, 24. Not so. First, it is well-established that where, as here, "Congress designates a forum for judicial review of administrative action, that forum is exclusive." *Louisville & Nashville R.R. Co. v. Donovan,* 713 F.2d 1243, 1245 (6th Cir. 1983) (cleaned up). Therefore, general federal-question jurisdiction is unavailing. The Declaratory Judgment Act is equally unhelpful, as that statute does not provide "an independent source of federal jurisdiction." *Schilling v. Rogers,* 363 U.S. 666, 677 (1960).

Yet another barrier stands in ABC's path, as the structure of the NLRA fully shields the General Counsel's prosecutorial decisions from review. In 1947, Congress added Section 3(d) of the NLRA to formally establish the position of General Counsel and to define her powers. This Court has recognized that the amendment strictly separated the General Counsel's prosecutorial powers from the Board's adjudicatory powers. *Rieth-Reilly Constr. Co. v. NLRB,* 114 F.4th 519, 530 (6th Cir. 2024) ("In response to complaints of bias and lack of uniformity in enforcement, the 1947 Taft-Hartley Act amendment to the NLRA created the General Counsel's office to separate the Board from the prosecutorial functions of the office."), *petition for rehearing filed* (No.

23-1899, Sept. 30, 2024); *Exela Enter. Sols., Inc. v. NLRB*, 32 F.4th 436, 443 (5th Cir. 2022) ("The NLRA creates a stark division of labor between the General Counsel and the Board."). In relevant part, Section 3(d) of the NLRA states that the General Counsel "shall have *final authority*" over investigatory and prosecutorial matters in unfair-labor-practice cases. 29 U.S.C. § 153(d) (emphasis added). The General Counsel's decisions to set prosecutorial priorities, as she did in the Memorandum, are thus distinct from the Board's authority to issue final orders subject to judicial review under Section 10 of the NLRA. *UFCW,* 484 U.S. at 128.

As a result of this separation, it is clear that the statutory provisions allowing for review of agency decisions only extend to decisions of the Board, not to prosecutorial functions of the General Counsel. *See* 29 U.S.C. §§ 160(e)-(f). The Supreme Court has expressly recognized this, finding that judicial review of the General Counsel's prosecutorial function is "precluded by statute." *UFCW,* 484 U.S. at 133 n. 31. In *UFCW*, the Court rejected an attempt by a charging party to obtain judicial review of the General Counsel's decision to dismiss an unfair-labor-practice case pursuant to a settlement between the

General Counsel and the charged party. *Id.* at 114. The Court concluded that "the structure of the act . . . leads inescapably to the conclusion that Congress distinguished orders of the General Counsel from Board orders." *Id.* at 128. In this way, the Court reasoned, Congress had decided to "authorize review of adjudications, not of prosecutions." *Id.* at 129; *see id.* at 124 ("The words, structure, and history of the LMRA amendments to the NLRA clearly reveal that Congress intended to differentiate between the General Counsel's and the Board's 'final authority' along a prosecutorial versus adjudicatory line."). This Court held, long before *UFCW*, that "it is well settled that the National Labor Relations Act precludes District Court review of the manner in which the General Counsel of the Board investigates unfair labor practice charges and determines whether to issue a complaint thereon." *Mayer v. Ordman*, 391 F.2d 889, 889 (6th Cir. 1968) (per curiam).

Indeed, the General Counsel's submission of a brief to the Board in *Cemex Construction Materials Pacific*, shortly after the Memorandum's publication, did exactly that; it sought to persuade the Board to change its position on captive-audience meetings, through the normal and exclusive administrative channel for doing so. *Cemex*

Construction Materials Pac. LLC, NLRB Case Nos. 28-CA-230115 et al., General Counsel Brief in Support of Exceptions, at 45-65 (Apr. 11, 2022), *available at* https://apps.nlrb.gov/link/document.aspx/09031d458372a363 (last visited Oct. 16, 2024). And this attempt was unsuccessful, as the Board declined to reach the merits of that issue. 372 NLRB No. 130, slip op. at 3 n.15 (2023).

ABC claims that the well-settled precedent precluding judicial review of the General Counsel's authority is inapplicable because it does not seek to enjoin or impede any pending proceedings before the Board. Br. 32. But ABC still ignores the NLRA's separation between the adjudicative powers vested with the Board, and the unreviewable prosecutorial powers vested with the General Counsel. ABC does not attempt to impute the Memorandum to the Board itself, nor could it, as the Memorandum is not binding on the Board and is not even entitled to deference. ABC's failure to grapple with the distinction between the General Counsel's prosecutorial authority and the Board's final adjudicatory authority is fatal to its arguments here.

In short, permitting ABC to bring its claims in district court—before a charge is filed or a complaint has issued—would circumvent

both the procedure Congress established for review of final Board orders and the unreviewable nature of actions taken by the statutorily-independent General Counsel. Congress's clearly defined scheme for judicial review cannot support such a result.

B. *Leedom v. Kyne*, not *Larson*, governs jurisdiction for claims of allegedly unlawful actions by NLRB officials

ABC also disputes the district court's rejection of its "*Larson* claim" challenging the General Counsel's Memorandum. Br. 33. *Larson* is a general jurisdictional doctrine that allows for suits against federal officials who act *ultra vires* or take actions that are "constitutionally void." *Larson v. Domestic & Foreign Com. Corp.,* 337 U.S. 682, 689-90, 701-02 (1949). ABC argues that *Larson* provides an equitable basis upon which to enjoin unlawful action by a federal officer in district court, including the General Counsel's allegedly unconstitutional Memorandum. Br. 24-28.

The district court correctly rejected this argument. As the lower court observed, the analysis in *Leedom v. Kyne,* 358 U.S. 184 (1958), and not *Larson*, governs the NLRA-specific claims at issue here. Opinion, R.23, Page ID # 9, n.2 ("The Court ultimately sees *Kyne* as applying *Larson's* general framework to NLRA proceedings and Board

action."). In *Kyne,* which was decided almost a decade after *Larson* and dealt with the same concern of *ultra vires* action in the NLRA context, the Supreme Court established "the *sole narrow* exception to the statutory jurisdictional requirements" under the NLRA. *Collins v. NLRB,* 94 F.3d 644 (6th Cir. 1996) (table).

In other words, *Larson's* general equity principles does not get ABC any closer to establishing jurisdiction in district court. This is because "[t]he power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." *Armstrong v. Exceptional Child Ctr., Inc.,* 575 U.S. 320, 327 (2015). This means that "Congress may displace the equitable relief that is traditionally available to enforce federal law." *Id.* at 329.

And that is exactly what Congress did when it enacted the NLRA. In *Myers,* the Supreme Court observed that the NLRA had supplanted the federal district courts' "equity jurisdiction" to safeguard "rights guaranteed by the Federal Constitution" from purportedly unlawful NLRB action. 303 U.S. at 43, 50. The Court further noted that the NLRA's judicial review provisions provided a party raising constitutional injuries "an adequate opportunity to secure judicial

protection against possible illegal action on the part of the Board." *Id.* at 48. Because the NLRA significantly abrogated the equitable jurisdiction of the courts, the lower court here correctly observed "*Kyne* as applying *Larson's* general framework to NLRA proceedings and Board action." Opinion, R.23, Page ID # 9, n. 2. It is revealing (and unsurprising) that ABC does not cite a single example of this Court or any other invoking *Larson* jurisdiction in an NLRB proceeding.

Nor does ABC satisfy *Kyne,* because it fails to meet that exception's two requirements 1) that "the Board acted in excess of its statutory powers," and 2) "without jurisdiction, the aggrieved parties have no other means within their control to protect and enforce their rights." *Detroit Newspaper Agency,* 286 F.3d at 398 (citing *Bd. of Governors of the Fed. Rsrv. Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43-44 (1991)).

First, ABC has not established that the General Counsel has acted beyond her statutory authority. ABC claims that, regardless of whether *Leedom* or *Larson* applies, the General Counsel's Memorandum is *ultra vires* because "posting memoranda publicly like Abruzzo's Memorandum is not essential to the General Counsel's investigative or prosecutorial

decisions under the NLRA." Br. 28-29. That argument fails to satisfy *Kyne*, because ABC has not pointed to an explicit statutory provision being violated by the issuance of the Memorandum. In actuality, the Memorandum falls squarely within the General Counsel's broad authority under Section 3(d), which includes 1) the "exercise of general supervision over all attorneys employed by the Board . . . and over the officers and employees in the regional offices"; 2) "final authority . . . in respect of the investigation of charges and issuance of complaints," and 3) "final authority . . . in respect of the prosecution of such complaints before the Board." 29 U.S.C. § 153(d).

This is precisely what the Memorandum is and does. It is directed to agency personnel, specifically "All Regional Directors, Officers-in-Charge, and Resident Officers," and therefore qualifies as an exercise of "general supervision." The Memorandum further instructs the staff that the General Counsel supervises regarding "the investigation of charges and issuance of complaints," pursuant to the legal theory contained therein. And the Memorandum provides that, in "respect of the prosecution of such complaints before the Board," the General Counsel will "ask the Board to reconsider current precedent on mandatory

meetings in appropriate cases." As such, it falls squarely within the bounds of her prosecutorial authority under Section 3(d).[3]

The presence of ABC's constitutional claims does not change this analysis. Br. 27-28. This Court has firmly rejected the notion that an allegation of a constitutional violation suffices to trigger district court jurisdiction to review decisionmaking under the NLRA. Holding otherwise would be "in clear violation of both the expressed Congressional purpose and the principle of exhaustion of administrative remedies." *Blue Cross & Blue Shield of Mich. v. NLRB*, 609 F.2d 240, 244-45 (6th Cir. 1979); *see also American Motors v. FTC*, 601 F.2d 1329,

[3] Additionally, as recognized by the lower court, General Counsel memoranda like the one challenged here serve the salutary purpose of openly informing the public of enforcement priorities by government officials that otherwise might be hidden from public view. Opinion, R. 23, Page ID # 384, referencing *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 442 F.2d 689, 699 (D.C. Cir. 1971).

The publishing of the Memorandum on the NLRB's website is, in fact, consistent with the Office of Management and Budget's Open Government Directive. This Directive is aimed at "promot[ing] accountability by providing the public with information about what the Government is doing." Open Government Directive, Memorandum 10-06, at 1-2 (Dec. 8, 2009), *available at* https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2010/m10-06.pdf (last visited Oct. 14, 2024).

1332 (6th Cir. 1979) (holding that a claim of constitutional violation does not obviate the "general rule" that "parties are required to employ the statutorily provided administrative and legal remedies before seeking . . . general equitable relief."). In light of these principles, the Sixth Circuit has correctly and consistently rejected attempts to bring constitutional challenges to NLRB actions in district court. *E.g., E. Greyhound Lines v. Fusco*, 323 F.2d 477, 479 (6th Cir. 1963) (finding no jurisdiction to hear claim that the Board's interpretation of "supervisor" under Section 2(3) of the NLRA violated the due process clause of the Fifth Amendment); *Blue Cross* 609 F.2d at 244-45 (finding jurisdiction lacking to hear due process claims regarding Board certification of an election under Section 9(c) of the Act where plaintiff retained "ample opportunity for review" under the Act).[4]

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[4] Nor is ABC correct in claiming that *Leedom* is inapplicable to actions by individual agency officials. Br. 33. *Leedom* itself involved a claim brought against the Board members in their individual and official capacities. 358 U.S. at 186. And this Court has universally applied *Leedom*, not *Larson*, to claims against particular NLRB officials, including the General Counsel. *E.g., Armco Steel Corp. v. Ordman,* 414 F.2d 259, 259-60 (6th Cir. 1969) (claim against General Counsel and Regional Director); *Detroit Newspaper Agency,* 286 F.2d at 395-96 (claim against General Counsel, Regional Director, and Board); *Am. Metal Prods. v. Reynolds,* 332 F.2d 434, 435 (6th Cir. 1964) (claim

Second, ABC cannot establish that, absent district court jurisdiction, its claims are unreviewable. Consistent with the reasoning in *Kyne*, the Sixth Circuit has recognized that a claimant cannot challenge NLRB action in district court where an opportunity for meaningful review already exists through the administrative process. *See Detroit Newspaper Agency*, 286 F.3d at 401. This proposition is bolstered by other circuits, which have also denied *Kyne* relief arising from unfair-labor-practice proceedings on the basis that the statutory review procedure adequately enables meaningful review. *See, e.g., AMERCO v. NLRB*, 458 F.3d 883, 889 (9th Cir. 2006); *Goethe House New York, German Cultural Ctr. v. NLRB*, 869 F.2d 75, 80 (2d Cir. 1989); *Grutka v. Barbour*, 549 F.2d 5, 9 (7th Cir. 1977); *see also Myers*, 303 U.S. at 50-53. The Supreme Court has made clear that during proceedings to enforce or review a final Board order, "all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to

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against Regional Director to enjoin opening ballots); *E. Greyhound Lines*, 323 F.2d at 478-80 (claim against Regional Director). Not to mention, governmental bodies can *only* act through particular officials. *See, e.g, City of St. Louis v. Prapronik*, 485 U.S. 112, 122 (1988).

examination by the court." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937). Thus, the NLRA affords aggrieved employers the right to circuit court review only after exhausting administrative remedies.[5]

The principle of limited district court jurisdiction applies with equal force to the type of First Amendment "chill" claims asserted by Appellants here. In *Grutka*, 549 F.2d at 5, an employer sought to enjoin an NLRB union-representation election for lay teachers at a Catholic school, arguing that the election would interfere with the free exercise of religious beliefs under the First Amendment. The district court granted the injunction on the theory that the employer's First Amendment claims were "not clearly frivolous." *Id.* at 7. The Seventh Circuit reversed, holding that "[t]he constitutional allegations of this complaint do not confer jurisdiction upon the district court because the statutory review procedures are fully adequate to protect the plaintiff's

[5] Requiring plaintiffs to raise claims administratively first is, of course, not unique to cases involving the NLRB. *See, e.g., MCorp Fin.*, 502 U.S. at 44 (rejecting bank's request to enjoin two agency proceedings against it where the bank would have "in the Court of Appeals, an unquestioned right to review of both the [relevant] regulation and its application").

constitutional rights." *Id.* at 9. In other words, because "the plaintiff's constitutional rights [had] adequate protection in the Court of Appeals, Congress' decision to place exclusive jurisdiction in [the circuit court] [was] unchallengeable." *Id.* at 9 n.7. Even if the union were to prevail in the election, the employer could still obtain adequate redress of its rights by refusing to bargain, which would likely result in a reviewable unfair-labor-practice order as to which the employer could press its constitutional claims.[6] *Id.* Because ABC Members similarly retain the right to raise their constitutional challenge in the event a charge is filed against them, the same result should follow here.

The instant case also illustrates the wisdom of limitations on district court jurisdiction over constitutional challenges to NLRB action.

[6] As a matter of fact, after a similarly situated employer, the Catholic Bishop of Chicago, proceeded through the congressionally dictated process of review under Section 10 of the NLRA, that employer ultimately prevailed on the merits. *Compare id.* at 9 (refusing to enjoin Board proceedings "because the statutory review procedures are fully adequate to protect the plaintiff's constitutional rights") with *Catholic Bishop of Chi. v. NLRB*, 559 F.2d 1112, 1131 (7th Cir. 1977) (vacating final Board order directing church-owned parochial school to bargain with faculty), *aff'd*, 440 U.S. 490, 494-95, 506 (1979).

As a general rule, courts do not rule on constitutional questions "unless such adjudication is unavoidable." *Matal v. Tam*, 582 U.S. 218, 231 (2017) (cleaned up); *see Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013) ("it is a well-settled principle of constitutional adjudication that courts will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of.") (cleaned up), *aff'd*, 573 U.S. 513 (2014); *accord Bowman v. Tenn. Valley Auth.,* 744 F.2d 1207, 1211 (6th Cir. 1984).

And even before the Board can adopt the Memorandum's legal theory, it must first decide the threshold issue, whether captive-audience meetings, absent certain safeguards, violate Section 8(a)(1) of the NLRA. (Only then would the Board proceed to analyze whether such a prohibition would violate the First Amendment.) Should the Board hold that captive-audience meetings do not violate the NLRA, ABC's constitutional claim would be entirely obviated. *See Elgin v. Dep't of Treasury*, 567 U.S. 1, 22-23 (2012) (presence of "preliminary questions unique to the employment context [that] may obviate the need to address the constitutional challenge" weighed against direct court review). After all, "[f]ederal courts are not in the business of

answering hypothetical questions. Let alone hypothetical questions of constitutional law." *Torres v. Precision Indus. Inc.,* 938 F.3d 752, 754 (6th Cir. 2019).

In sum, neither *Larson* nor *Leedom* support the exercise of district court jurisdiction over ABC's constitutional challenge.

C. General Principles of Non-Statutory Equitable Jurisdiction Confirm that ABC's Claims Lack Subject-Matter Jurisdiction

Any doubt regarding the lack of jurisdiction here is resolved by looking at the Supreme Court's more recent treatment of district court jurisdiction in the face of an exclusive review statute. In answering this question, the Supreme Court has often utilized the three-part *Thunder Basin* inquiry to determine whether jurisdiction is appropriate. That test asks 1) "could precluding district court jurisdiction 'foreclose all meaningful judicial review'"; 2) "is the claim 'wholly collateral to [the] statute's review provisions'"; and 3) "is the claim 'outside the agency's expertise.'" *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 212-13 (1994). The answer to all of these questions here is no.

Taking these factors in reverse order, the type of speech issues presented here are routinely reviewed by the Board and fall within its

particular administrative expertise. To wit, the Board has a long history of interpreting the NLRA's restriction on coercion by employers and labor organizations in light of free-speech principles, and those decisions are subject to review by circuit courts. *See, e.g., Detroit Newspapers, Inc. v. NLRB,* 402 F.3d 651, 659-60 (6th Cir. 2005); *Cook Paint & Varnish Co. v. NLRB*, 648 F.2d 712, 719 (D.C. Cir. 1981); *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941); *Int'l Union of Operating Eng'rs, Loc. 150 (Lippert Components)*, 371 NLRB No. 8, slip op. at 2 (2021) (Chairman McFerran, concurring). As noted above at p. 34, the courts (as well as the Board) have a duty to avoid reaching constitutional issues.

Second, the General Counsel's legal theory is not "wholly collateral" to the Board's administrative processes. Unlike claims that allow for direct jurisdiction, ABC's constitutional challenge is not an objection to the Agency's "power generally," *Axon Enterprise, Inc. v. FTC,* 598 U.S. 175,193 (2023), but rather an attack on "how [the agency's] power was wielded." *Id.* In other words, the Supreme Court has made clear that claims directed at the "subject of . . . enforcement actions" are not collateral. *Id.* ABC's attack on the Memorandum

necessarily involves challenges to future enforcement actions, because the Memorandum merely describes the General Counsel's legal theory in future cases, none of which currently involve ABC or its members.

In this regard, ABC's challenges are virtually indistinguishable from those that the Supreme Court found lacked jurisdiction in *Elgin v. Department of Treasury*, 567 U.S. at 22. There, the Supreme Court found that constitutional challenges to military draft registration requirements by federal employees who had lost their employment needed to be brought through administrative proceedings, rather than directly to federal court. Those constitutional challenges were merely "the vehicle by which they seek to reverse the removal decisions [and] return to federal employment." *Id.* Congress, however, chose to channel these type of employment claims to the Merit System Protections Board (MSPB), with review in the circuit courts of appeals. The Supreme Court concluded that the statutory scheme "was intended to preclude district court jurisdiction over" those constitutional claims. *Id.* at 23. The Memorandum similarly concerns core conduct under the NLRA, namely the question of whether captive audience meetings violation Section 8(a)(1) of the Act, which Congress has explicitly removed from

district court jurisdiction through the Act's exclusive statutory review scheme. Accordingly, the General Counsel's legal theory is not "wholly collateral" to the NLRA's review procedures, and this factor strongly weighs against district court jurisdiction here.

Third, precluding review here would not foreclose all meaningful avenues for review of agency action by ABC or its members. This proposition is confirmed by the Supreme Court's decision in *Myers*, where the Court held that "the rules requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage." 303 U.S. at 51; *cf. Tennessee v. Dep't of Educ.,* 104 F.4th 577, 606 (6th Cir. 2024) (noting that because Title IX violations had been universally resolved "informally," and "informal" determinations were not subject to judicial review, parties lacked "meaningful review" to challenge regulation.) Further, given that the Board's powers are purely "remedial, not punitive," *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940), this does not "approach a situation in which compliance is sufficiently onerous and coercive penalties

sufficiently potent that a constitutionally intolerable choice might be presented." *Thunder Basin Coal Co.*, 510 U.S. at 218. In fact, the Memorandum is being currently challenged by employers, on these same constitutional grounds, in numerous cases before the Board.[7] Should any of ABC's members face unfair labor practice complaints based on the Memorandum's legal theory, they will be able to obtain meaningful judicial review.

III. The District Court Correctly Concluded that ABC Michigan Lacks Standing.

The district court properly dismissed the Complaint because ABC does not have standing, associational or otherwise, to bring this suit. Opinion, R. 23, Page ID ## 385-89. Here, ABC makes no claim to standing on its own behalf. Rather, it pleads its claims only as the representative of its members. Complaint, R. 1, Page ID ## 16-19. To

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[7] *See, e.g.,* General Counsel's Brief in Support of Exceptions, *Starbucks Corporation*, NLRB Case No. 08-CA-290673, at *4-5 (available at https://apps.nlrb.gov/link/document.aspx/09031d4583da28cb) (last visited Oct. 16, 2024); General Counsel's Brief in Support of Exceptions, *UPS Supply Chain Solutions, Inc.*, NLRB Case No. 32-CA-295913, at *4-11 (available at https://apps.nlrb.gov/link/document.aspx/09031d4583d98eb5) (last visited Oct. 16, 2024).

establish standing on a representative basis, an association like ABC must prove, among other factors, that its members have standing to sue in their own right. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *Ass'n of Am. Physicians & Surgeons v. U.S. Food & Drug Admin.*, 13 F.4th 531, 537 (6th Cir. 2021). To do so, it must "identify members who have suffered the requisite harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492, 499 (2009). Specifically, it "must show that one of its named members '(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'" *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 900 F.3d 250, 255 (6th Cir. 2018) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)).

A. ABC did not plead facts demonstrating injury or imminent harm to any of its members.

ABC's associational standing claim falters at the start, as it does not show that it or any of its members suffered the requisite injury-in-fact.

1. ABC's pleading fails to meet the requirements for a pre-enforcement challenge to the Memorandum.

Where, as here, a party seeks to establish standing based on the pre-enforcement chilling effect of government action, plaintiffs establish

injury by demonstrating that "(1) [they] intend to engage in expression that the Free Speech Clause arguably protects, (2) their expression is arguably proscribed by the [policy in question], and (3) they face a credible threat of enforcement from [the challenged policy]." *Fischer v. Thomas*, 52 F.4th 303, 307 (6th Cir. 2022) (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161-64 (2014)).

Neither ABC nor any of its members have established any of the requirements to demonstrate a chilling effect caused by the Memorandum: 1) they have not pled any intent to engage in expression covered by the Memorandum; 2) any expressions by ABC's members that would occur is not "proscribed" by the Memorandum; and 3) there is no credible threat of enforcement attributable to the Memorandum.

First, while broadly claiming that its members *would* hold captive audience meetings to counter union campaigns if not for the General Counsel's Memorandum, Complaint, R. 1, Page ID # 19, at para 97, ABC identifies no member with concrete plans to do so. Opinion, R. 23, Page ID # 388. The supposed plans to hold such meetings in the absence of the Memorandum's publication are hypothetical, might never happen at all, and are certainly not alleged to be impending at any specific

employer. "[U]nsupported shoulda-coulda-woulda allegations are not enough" to constitute an injury in fact. *Norton v. Beasley*, No. 21-6053, 2022 WL 17348385, at *8 (6th Cir. Dec. 1, 2022); *see also Memphis A. Phillip Randolph Inst. v. Hargett*, 978 F.3d 378 (6th Cir. 2020) (finding no injury in fact where plaintiffs failed to demonstrate "actual, concrete, particularized, and imminent threat of harm," as their allegations instead involved "two layers of speculation").

Second, the conduct ABC claims its members wish to engage in is not "arguably proscribed" by the Memorandum. The Memorandum proscribes nothing, as it has no legal power or effect. Particularly instructive is *American Federation of Government Employees v. O'Connor,* 747 F.2d 748 (D.C. Cir. 1984), which declined to review the Office of the Special Counsel's advisory opinion on activity prohibited by the Hatch Act. The D.C. Circuit explained that, like the Board, the Merit Systems Protection Board adjudicates cases presented to it by its Special Counsel, but had not yet opined upon the Special Counsel's legal theory. Because the MSPB "speak[s] the final administrative word on the meaning of the statute" and "is [therefore] free to disagree with the Special Counsel," the D.C. Circuit found no jurisdiction to review

the Special Counsel's advisory opinion. *Id.* at 753. So too here. The Memorandum merely explains the General Counsel's legal theory that the NLRA prohibits forcing employees to listen to employer speech about unionization against their will; significantly, the Board's current interpretation of the NLRA is to the contrary. *See, e.g.*, *Babcock & Wilcox*, 77 NLRB 577, 578 (1948); *see also 2 Sisters Food Group*, 357 NLRB 1816 (2011) (tacitly declining to adopt dissenting Board member's view that *Babcock* should be overruled). Only a Board decision reversing this extant caselaw could "proscribe" such conduct under the NLRA.

Finally, ABC cannot show that any threat of enforcement is credible. ABC perfunctorily states it is on notice of the Memorandum's contents and of a related news article, both of which plainly indicate that the General Counsel does *not* plan to prosecute any and every employer who holds a captive audience meeting. Complaint, R. 1, Page ID # 17-18, paras 90-95. The Memorandum itself directs Regional Officers *only* to pursue the General Counsel's theory in "appropriate cases." Complaint Exh. 1, R. 1-1, Page ID # 33. Further, the news article offered by ABC reports that the General Counsel "won't issue

complaints for conduct that's legal under current board law that she wants changed, unless there are related alleged violations of current law." Complaint Exh. 2, R. 1-2, Page ID # 36. Thus, ABC's own exhibits make clear that merely holding captive audience meetings—were any of its members ever to do so—will not result in an unfair labor practice complaint, so long as the employer commits no violations of current Board law.

And so, even if ABC established the first two elements of the pre-enforcement chill analysis, the Memorandum cannot be understood as a threat of prosecution. The Sixth Circuit has emphasized that "mere allegations of a 'subjective chill' on protected speech are insufficient to establish an injury-in-fact for pre-enforcement standing purposes," *McKay v. Federspiel*, 823 F.3d 862, 868–69 (6th Cir. 2016). ABC must also show a "*certainly impending*" threat of prosecution. *Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 454 (6th Cir. 2017) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)).

This Court refuses to merely "assume a credible threat, but instead applies a "fact-bound approach embodied by the *McKay* factors." *Christian Healthcare Ctrs., Inc. v. Nessel*, No. 23-1769, --- F.4th ----,

2024 WL 4249251, at *14 (6th Cir. Sept. 20, 2024). These factors include "(1) 'a history of past enforcement against the plaintiffs or others'; (2) 'enforcement warning letters sent to the plaintiffs regarding their specific conduct'; (3) 'an attribute of the challenged statute that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action'; and (4) the 'defendant's refusal to disavow enforcement of the challenged statute against a particular plaintiff.'" *Friends of George's, Inc. v. Mulroy*, 108 F.4th 431, 439 (6th Cir. 2024) (quoting *McKay*, 823 F.3d at 868–69). Here, each *McKay* factor weighs against finding a threat of enforcement.

With regard to the first factor, ABC does not allege that any of its members have been subject to unfair labor practice proceedings for conducting captive audience meetings. While the General Counsel acknowledges that numerous proceedings against other employers may *include* captive audience allegations, none of those cases were initiated *as a result of* a captive audience charge. *See* above at n. 7. Instead, the General Counsel only litigates captive audience allegations if they are coupled with other alleged conduct that violates extant law. Complaint

Exh. 2, R. 1-2, Page ID # 36. Thus, ABC can point to no history of unfair labor practice proceedings resulting solely from the issuance of the Memorandum. Accordingly, this factor weighs against finding the Memorandum to be a threat of prosecution.

The second *McKay* factor undisputably weighs against finding prosecution, as the General Counsel has issued no letters to ABC or any of its members regarding captive audience meetings. In contrast, in every case ABC cites in support of its chill argument (Br. 40-41), the government directed the alleged threat at the specific party claiming to have been threatened. *See Vuollo*, 602 U.S. at 183-84 (New York superintendent of financial services sent guidance letters to insurance companies and financial services institutions all but instructing them to sever their relationships with gun promotion organizations or risk enforcement action); *Bantam Books*, 372 U.S. 58 at 61–63 (1963) (Rhode Island commission sent notices to a book distributor deeming certain of his publications objectionable for sale to youths); *Backpage.com, LLC v. Dart*, 807 F.3d 229, 231–32 (7th Cir. 2015) (county sheriff sent a letter to credit card companies requesting that they immediately cease and desist from allowing their cards to be used to place ads on classified ad

websites that permitted "adult" ads); *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) (city borough president sent letter to billboard company asking that the company contact the borough president's legal counsel and anti-bias task force chair to discuss anti-gay billboard ads); *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992) (university president sent schoolwide memorandum announcing committee to investigate whether certain professor's views affected his teaching abilities).

With regard to the third factor, the Memorandum does not make enforcement more likely. While any person may file a ULP charge, *only* the General Counsel has the discretion to initiate a ULP proceeding by issuing complaint. *See* 29 U.S.C. § 153(d). Moreover, the General Counsel will not issue a complaint based solely on conduct covered by the Memorandum. Such conduct will only be the subject of a ULP proceeding if joined with other conduct that violates extant law. Complaint Exh 2, R. 1-2, Page ID # 36. Thus, there is no attribute of the Memorandum that makes the initiation of unfair labor proceedings any more likely to occur.

The fourth *McKay* factor, disavowal of enforcement against plaintiff, also weighs against finding a threat. Here, the General

Counsel has publicly disavowed bringing charges against any employer (including ABC and its members) for merely conducting a captive audience meeting. As ABC's own exhibit indicates, the General Counsel won't issue complaints seeking to *change* Board law unless accompanied by a violation of *existing* Board law. Complaint Exh 2, R. 1-2, Page ID # 36. Thus, since the initiation of the instant litigation, ABC and its members have been "on notice" that they will not be subject to an unfair labor practice proceeding for such conduct in isolation.

Accordingly, each *McKay* factor weighs against finding the Memorandum to be a threat of prosecution. Instead, like in *Laird v. Tatum,* 408 U.S. 1 (1972), ABC and its members merely "disagree with the judgments made by the [General Counsel]" and assert "that the very existence of [Memorandum] produces a constitutionally impermissible chilling effect." *Id.* at 13. This is insufficient. As in *Laird*, this purely "subjective" evidence of chill does not confer standing. *Id.* at 15-16.

2. The Memorandum is not analogous to the policies challenged in the First Amendment chill cases ABC relies upon.

The other chill cases cited by ABC are readily distinguishable from the instant matter. For example, in *Speech First, Inc. v. Schlissel,*

although the court acknowledged that a bias referral by the university was "not, for example, a criminal conviction or expulsion. . . the referral subjects students to processes which could *lead* to those punishments." 939 F.3d 756, 765 (6th Cir. 2019). In contrast, the Memorandum carries no similarly significant legal consequences. All that ABC's members hypothetically face is a potential administrative hearing, and potential posting of a remedial notice, (*if* the Board adopts the General Counsel's position), because the Board's powers are purely "remedial, not punitive." *Republic Steel Corp. v. NLRB*, 311 U.S. at 12. *See, e.g., In Re J. & R. Flooring, Inc.*, 356 NLRB 11, 12 (2010) ("The Board's standard notice posting provision therefore requires respondents to post a remedial notice for a period of 60 days in conspicuous places including all places where notices to employees members are customarily posted.") (cleaned up). Thus, because the Board's limited enforcement powers carry no "threat of punishment and intimidation," *Speech First*, 939 F.3d at 761, the "chill" felt by ABC's members is insufficient to create Article III standing. Similarly, in other cases finding sufficient harm to establish chill, the potential punishment far exceeded what is at stake in unfair labor practice proceedings. *E.g., Steffel v. Thompson*,

415 U.S. 452, 459 (1974) (criminal prosecution); *Susan B. Anthony List,* 573 U.S. at 166 (same).[8]

3. ABC's claim of injury-in-fact is further undermined by numerous preconditions and contingencies.

The Supreme Court has previously explained that "threatened injury must be certainly impending to constitute injury in fact." *Clapper*, 568 U.S. at 410 (cleaned up). For this reason, the Court has expressed a consistent "reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Id.* at 414.

Here, ABC's theories depend upon just such speculation, as the chain of events required to give rise to ABC's feared harm is both attenuated and hypothetical. To face legal consequences, all of the following contingencies would need to occur: 1) at least one of ABC's

[8] Even if any of ABC's members face the presently remote contingency of an administrative proceeding, "mere litigation expense, even substantial and unrecoupable cost," is not irreparable. *See Renegotiation Bd. v. Bannercraft Clothing Co.,* 415 U.S. 1, 24 (1974); *see also FTC v. Standard Oil of Cal.*, 449 U.S. 232, 244 (1980) (recognizing that costs of administrative proceedings "will be substantial," but finding that "the expense and annoyance of litigation is part of the social burden of living under government").

members would have to first take action implicating the Memorandum by forcing employees to listen to their views on unions; 2) ABC's members would then have to engage in some *additional* unlawful conduct prohibited under extant law; 3) a third party would have to file an unfair-labor-practice charge against them, as the General Counsel possess no independent investigative authority;[9] 4) an NLRB regional director would have to find merit to the charge and issue an administrative complaint; 5) that complaint would need to proceed to an administrative hearing resulting in an ALJ Decision; 6) the General Counsel would need to then file exceptions to the Board; 7) the Board would need to agree with the legal theory espoused in the Memorandum; and 8) a circuit court of appeals would need to agree with the Board's decision and enforce it against an ABC member. This specific chain of events occurring is far from "certainly impending."

Crucially, many of these contingencies—such as the filing of an unfair labor practice charge, the Board adopting the General Counsel's legal theory, and a circuit court enforcing the Board's order—are

[9] *E.g., Chamber of Commerce of United States v. NLRB*, 721 F.3d 152, 155-56 (4th Cir. 2013).

entirely outside the control of the General Counsel. The importance of those independent actors as a further obstacle to standing was recently emphasized by the Supreme Court in its recent decision of *Murthy v. Missouri*, 144 S. Ct. 1972 (2024). There, plaintiffs alleged that federal officials' communications with third-party social media platforms about COVID-19 and election-related misinformation pressured the platforms to restrict the plaintiffs' social media posts on those subjects. *Id.* at 1984. To demonstrate standing, the plaintiffs were required to "show that the third-party platforms 'will likely react in predictable ways' to the defendants' conduct." *Id.* (citing *Dep't of Com. v. New York*, 588 U.S. 752, 768 (2019)). The Court, recognizing the "bedrock principle that a federal court cannot redress 'injury that results from the independent action of some third party not before the court,'" found that any injury suffered by plaintiffs could not be attributable to the defendants' conduct. *Id.* (citing *Simon v. E. Ky. Welfare Rts. Org.*, 426 U. S., 26, 41–42 (1976)). Noting its "reluctan[ce] to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment," *id.* (citing *Clapper*, 568 U. S. at 413), the Court found "no concrete link between [the plaintiffs'] injuries and the defendants'

conduct," *id.* at 1997, and thus found no Article III standing had been demonstrated. So although ABC alleges that the General Counsel's Memorandum constitutes unlawful governmental "jawboning," Br. 60-61, *Murthy* explains that establishing First Amendment chill requires a real demonstration of injury, not a speculative chain of attenuated causation.

The Supreme Court's analysis in *Murthy* is consistent with this Court's decision in *Ass'n of Am. Physicians*, 13 F.4th at 531, a case properly followed by the lower court here. Opinion, R. 23, Page ID ## 387-388. In that case, the plaintiff argued that its injury was sufficiently concrete because, although the FDA could not itself regulate plaintiff's members, the FDA's actions could nevertheless result in prosecution by state medical boards. *Ass'n of Am. Physicians*, 13 F.4th at 545. The Sixth Circuit disagreed, holding that chain of contingencies too remote to cause harm, as it relied on the actions of independent actors—namely state medical boards—not the defendant FDA. *Id.* Here, as in that case and *Murthy*, ABC's fear of harm relies wholly on the possibility that some independent (and indeed, unknown) third party might bring ULP charges against an unspecified member of ABC.

In short, ABC has—at most—demonstrated through its pleadings a subjective, speculative fear of prosecution. However, such "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm" because federal courts "'do not render advisory opinions.'" *Laird*, 408 U.S. at 13-14 (quoting *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89 (1947)). In other words, not "every plaintiff who alleges a First Amendment chilling effect and shivers in court has thereby established a case or controversy." *Nat'l Student Ass'n v. Hershey*, 412 F.2d 1103, 1114 (D.C. Cir. 1969). Similarly, ABC has failed to plead sufficient facts showing injury or imminent harm to any of its members, and its complaint was properly dismissed for lack of standing.

B. The Memorandum is not the cause of the alleged harm, nor would its removal from the Board's website redress the claimed injury.

Nor has ABC demonstrated redressability, as it must to show Article III standing. As *Murthy* explains, "to determine whether an injury is redressable, we consider the relationship between the judicial relief requested and the injury suffered." 144 S.Ct. at 1995 (cleaned up).

ABC's Complaint seeks an injunction ordering the General Counsel to retract her Memorandum, remove it from the Board's website, and cease threatening ABC's members with prosecution based on it. Complaint, R. 1, Page ID # 28. But the General Counsel's pending complaints relying upon this theory stand wholly independent from the Memorandum. As noted above at pp. 6-7, the General Counsel has issued numerous complaints that include allegations of particular captive audience meetings being unlawful; the Board currently has cases pending on its docket through which it can decide the merits of the General Counsel's theory.

Understandably, ABC does not seek to enjoin the General Counsel from issuing such complaints (Br. 68-69), as that authority is judicially unreviewable under Section 3(d) of the Act, and *UFCW*, above. But simply rescinding the Memorandum, as requested by ABC, would not redress any of the harm alleged by ABC. The pending complaints urging the Board to adopt the Memorandum's theory are available to the public, and their effect has already been felt by members of their regulated community. Thus, as explained by the lower court, ABC has failed to demonstrate in "how the [M]emorandum (one that admittedly

has no legal force) chills its members any more than a brief in an existing case that takes the same position as the [M]emorandum and urges the Board to overturn its precedent." Opinion, R. 23, Page ID # 389

Although ABC offers bare conclusory statements that its members "injury and chilled speech would be redressed by a favorable court decision and injunction ordering Abruzzo to retract, delete and remove" the Memorandum from the NLRB website, Br. 50, ABC never explains why this is so. Instead, rescinding the Memorandum would accomplish nothing, and fail to redress ABC's alleged harm. *See California v. Texas,* 593 U.S. 659, 673 (2021) (finding no redressability where proposed remedy "would amount to an advisory opinion without the possibility of any judicial relief.") (cleaned up).

IV. Should this Court Find that Subject Matter Jurisdiction and Standing are Satisfied, this Matter should then be Remanded to the Lower Court for a Determination Whether ABC is Entitled to a Preliminary Injunction.

ABC rushes headlong by asking this Court to rule on the appropriateness of a preliminary injunction. Br. 64-68. This is wholly inappropriate, as the lower court dismissed ABC's claims for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure

12(b)(1), Opinion, R. 23, Page ID # 389, without reaching any of the substantive preliminary injunction factors. *Id.*

Instructively, "it is the general rule . . . that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *see also Moody v. NetChoice, LLC*, 144 S.Ct. 2383, 2399 (2024) ("we are a court of review, not of first view.") (cleaned up). Although a decision to reach such an issue is "left primarily to the discretion of the courts of appeals, to be exercised in individual cases," the Supreme Court has cautioned that such discretion should be limited to "exceptional cases or particular circumstances" or where denying review would create "a plain miscarriage of justice." *Singleton*, 428 U.S. at 121. Significantly, "[t]his court has rarely exercised this discretion" to decide issues not resolved by the lower court. *Milan Express Co., Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 672 F. App'x 553, 556 (6th Cir. 2016).[10]

In considering whether this Court should proceed to determine the appropriateness of a preliminary injunction, this Circuit's recent

[10] Nor did ABC ever bother to file a motion for injunction pending appeal under Federal Rule of Appellate Procedure 8.

decision in *Dutton v. Shaffer,* No. 23-5850, 2024 WL 3831884 (6th Cir. Aug. 15, 2024), explains why this Court should no. In that case, a Kentucky state court judge sought a preliminary injunction against enforcement of certain provisions of Kentucky's Judicial Code of Conduct against her, alleging that the provisions violated the First Amendment by chilling her from exercising her free speech rights. *Id.* at *1-2. The lower court denied the requested injunction, finding the state judge had failed to establish irreparable harm and declining to address the remaining preliminary injunction factors. *Id.* at *2-3. This Court reversed the district court's determination on irreparable harm, which left open the question of whether to proceed to decision on the remaining preliminary injunction factors. Although there were apparently no disputed issues of fact, and no deference would be applied to a determination of likelihood of success, this Court nevertheless declined to reach the "ultimate question" and remanded the case the lower court for an assessment of the outstanding issues. *Dutton,* 2024 WL 3831884, at *5; *see Speech First, Inc.*, 939 F.3d at 770 (remanding to lower court in similar circumstances involving preliminary injunction

on First Amendment grounds to determine "ultimate question of Speech First's likelihood of success on the merits").

Here, the reasons for this Court to decline to proceed to the "ultimate question" of issuing a preliminary injunction are even stronger than in *Dutton*. In that case, the lower court had decided at least some of the questions necessary to determine whether a preliminary injunction was warranted. *Dutton,* 2024 WL 3831884, at *4. Here, *none* of those issues have been addressed by the district court, as ABC's claims were dismissed solely on subject matter jurisdiction and standing grounds. Because this Court grants "substantial deference" to the lower court's determination of the preliminary injunction factors (other than likelihood of success), *id.* at *5, it should remand for a consideration of these factors in the event it finds that ABC has established both subject-matter jurisdiction and standing.[11]

[11] In the event this Court decides to fully examine whether a preliminary injunction should have been granted or to address the merits of ABC's complaint, the NLRB requests the opportunity for supplemental briefing on these issues. Among other reasons why an injunction is unwarranted is ABC's unexplained and inequitable delay in raising and pursuing its claims. Specifically, ABC waited almost a year after the Memorandum issued to file its initial complaint, and then never requested an injunction pending appeal or even expedited

CONCLUSION

The General Counsel respectfully requests that the Court enter a judgment affirming the district court's dismissal of the Complaint.

Respectfully submitted,

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briefing from this Court after the district court's dismissal order. That delay sharply undermines the credibility of ABC's claimed need for this extraordinary remedy. *See Reams v. Vrooman-Fehn Printing Co.*, 140 F.2d 237, 242 (6th Cir. 1944) ("Injunctive relief is reserved for those who manifest reasonable diligence in asserting their rights to equitable protection."); *see generally Benisek v. Lamone*, 585 U.S. 155, 159 (2018) (movant must "show reasonable diligence").

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 6 Cir. R. 32(b) because it contains 11,681 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: October 16, 2024 /s/ Tyler Wiese________
at Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2024, the foregoing Appellee's Brief was filed through the Court's Electronic Filing System, which will send notice to all counsel appearing in this matter.

/s/ Tyler Wiese

STATUTORY ADDENDUM

Submitted pursuant to Federal Rule of Appellate Procedure 28(f)

Relevant provisions of the National Labor Relations Act,
29 U.S.C. §151 *et seq*.

29 U.S.C. § 153(d)
(d) General Counsel; appointment and tenure; powers and duties; vacancy There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

29 U.S.C. § 157
§ 157. Right of employees as to organization, collective bargaining, etc. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be

affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158(a)(1)

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

29 U.S.C. § 160(e)

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable

grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

29 U.S.C. § 160(f)

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of

fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

ADDENDUM

Designation of relevant district court documents.
Submitted pursuant to 6 Cir. Rules 28(a)(1), 28(b)(1)(A)(i), and 30(g)(1).

Case No. 1:23-cv-00277 District Court for the Western District of Michigan		
District Court Record Entry Number	Description	Page ID #
1	Complaint	1-29
1-1	Exhibit 1 – GC Memorandum	30-33
1-2	Exhibit 2 – Bloomberg Article	34-37
5	Motion for Preliminary Injunction	56-61
6	Brief in support of Motion for Preliminary Injunction	62-105
16	Motion to Dismiss	136-189
17	Response in Opposition to Preliminary Injunction	190-211
19	Reply in Support of Motion for Preliminary Injunction	213-234
20	Response in Opposition to Motion to Dismiss	235-275
21	Reply in Support of Motion to Dismiss	276-300
23	Opinion and Order	375-389
24	Judgment	390
25	Transcript of Oral Argument	391-427
26	Notice of Appeal	428-429